No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, *et al.*,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANT

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This brief *amicus curiae* in support of appellant is submitted with the consent of counsel to all parties.

INTEREST OF AMICUS

Mid-America has an interest in the disposition of this case which is before this Court on appeal from the judgment of the Supreme Court of California denying appellant's Writ of

Review of the decision of the California Public Utilities Commission (the *"Commission"*) in *TURN v. PG&E,* Decision No. 83-12-047, slip op. (Cal. PUC Dec. 20, 1983), as modified on May 2, 1984, *TURN V. PG&E* Decision No. 84-04-039, slip op. (Cal. PUC May 2, 1984). Mid-America was organized to support the public interest in preserving the economic and social freedoms of our democratic society.

The case now before this Court involves important constitutional issues addressing the basic right of Pacific Gas and Electric Company (*"PG&E"*) to control the use of property for communication and the extent to which this right may be taken by a state regulatory body and transferred to a third party. The significance of the decision of the California Public Utilities Commission and the denial of judicial review by the Supreme Court of California transcend the arena of utility regulation and have ramifications affecting constitutional rights generally.

Amicus presents an analysis with relevant authority of how the award to a ratepayer group of access to "extra" space in the billing envelope constitutes an unlawful taking without just compensation of PG&E's right to control the use of this property in violation of the Fifth Amendment of the United States Constitution as made applicable to the States through the Fourteenth Amendment as well as an infringement of PG&E's First Amendment rights in the use and control of such property. *Amicus* will not address herein the First Amendment arguments presented by PG&E. Instead, *amicus* will address the *ipse dixit* assertion by the Commission that the "extra" space in a billing envelope is not the property of PG&E. That novel assertion would overturn the distinction between governmental regulation and governmental taking of property and reject the constitutional requirement of just compensation for the taking of private property.

SUMMARY OF ARGUMENT

State regulation of public utilities has been recognized for over one hundred years. State regulation, however, is not tantamount to state ownership of a utility. Most public utilities are privately owned and, as such, possess constitutional rights. One of these rights is the Fifth Amendment right to own and use property made applicable to the states under the Fourteenth Amendment. This Court has ruled that the property of a public utility, although devoted to a public use, remains private property and neither the corpus nor the use of the property may be taken without just compensation.

Under California law, the Commission has the power to do whatever is "necessary and convenient" to "ensure the public adequate service at reasonable rates without discrimination." This broad grant of power to the Commission, however, is not without limits. Historically, the Commission has been limited to regulation which does not impinge upon the utility's right to manage and control its own property. Billing envelopes are the private property of the utility. The utility thus has a right to control the use of this property. The Commission's decision to award use of the "extra" space in the envelopes to a third party strips the utility of this right and is therefore an unconstitutional taking in violation of the utility's Fifth Amendment rights as well as an infringement of its First Amendment rights.

ARGUMENT

I. The Power to Regulate Does Not Include the Power to Take Property Without Just Compensation.

State regulation of utilities has been held a valid exercise of police power since the recognition of utilities as natural monopolies. *Munn v. Illinois,* 94 U.S. 113, 126 (1876). Regulation, however, does not amount to ownership. Although there may be a trade-off of monopoly power for greater regulation, public utilities may still be privately owned. *United Railways & Electric Co. of Baltimore v. West,* 280 U.S. 234, 249 (1930). As private entities, public utilities do enjoy constitutional rights. *Santa Clara County v. Southern Pacific Railroad,* 118 U.S. 394, 596 (1886).

Although the California legislature delegates to the Commission the broad power to do all things necessary and convenient to regulate utilities, regulation of a public utility is not the same as ownership of public utility property. This Court made the distinction in *Southwestern Bell Telephone Co. v. Public Service Commission,* 262 U.S. 276, 289 (1923):

> It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and *is not clothed with the general power of management incident to ownership* (emphasis supplied).

The California Supreme Court has also distinguished regulatory power from rights of ownership. In *Pacific Telephone & Telegraph Co. v. Public Utility Commission,* 34 Cal.2d 822, 828, 215 P.2d 441, 445 (1950), the court stated:

> [I]t may not be amiss to point out that the devotion to public use by a person or corporation of property held by them in ownership does not destroy their ownership, and does not vest title to the property in the public. . . .

Since regulation of a public utility is distinct from ownership of its property, any exercise of regulatory power to

transfer property rights must pass constitutional muster. The taking clause of the Fifth Amendment is invoked when a state transfers private property rights to another against the owner's will. U.S. CONST. amend V; *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980). The Fifth Amendment requires payment of just compensation when government appropriates private property. This requirement is intended to curb the arbitrary exercise of a state's police power. *See,* Comment, *Access to Public Utility Communications,* 21 San Diego L. Rev. at 391.

Property rights under the Fifth Amendment are expectancies or interests related to a thing. *United States v. Motors Corp.,* 323 U.S. 373 (1945). These rights include the right to use property, *United States v. Causby,* 328 U.S. 256 (1946); to sell property, *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922); and to exclude others from property, *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Therefore, the Commission is limited to regulation which does not impinge upon a private entity's right to use or manage its property as it wishes.

The reasons for maintaining private ownership and management of utility property are compelling. As one author states, "[i]t is not hard to show that utility regulation recognizes, and indeed depends upon, private ownership and management . . . . If the state legislatures had wished to own and manage utilities they could have done so." Comment, *"Management Invaded"—A Real or False Defense?,* 5 Stan. L. Rev. 110, 126 (1952).

II. The Decision of the Public Utilities Commission to Allow a Third Party Access to the Billing Envelope Violates the Constitutional Rights of Pacific Gas and Electric Company.

The Commission has determined that the extra space in the billing envelope is property of the ratepayers and not PG&E.

Appendix to Jurisdictional Statement ("app.") p. 26. In prior decisions in which the Commission attempted to articulate the ratepayers' interest. however, it expressly distinguished their right from a traditional property right. *Id* at 3-4.

The Commission first addressed the issue of who owns the extra space in 1981 when it ruled on TURN's claim that PG&E had violated advertising standards set out in the Public Utility Regulatory Policies Act of 1978. In this decision, the Commission said that the economic value of the extra space in the envelope belongs to the ratepayers because they create the space by paying for the envelope and postage. It said further that use of the space for the Progress instead of some other purposes deprives the ratepayers of that "value" which they own (Decision No. 93887, app. p. 67).

The Commission subsequently tried to clarify the nature of the ratepayers' interest in *Center for Public Interest Law v. San Diego Gas & Electric Co.,* (Decision No. 83-04-020, app. p. 90). The Commission said that although the extra space belongs to the ratepayer, it was not describing a traditional property right, but an equity right. In defining this equity right, the Commission said that not everything paid for with ratepayer money is the sole property of the ratepayer. However, the ratepayers derive their interest in the extra space because they pay for the conveyance of their bills and occasional legally mandated notices, which are costs necessary to the operation of the utility app. p. 100). The Commission also believed that equity requires that the extra space be used in the manner most beneficial to the ratepayers who have paid for it (app. p. 101).

In its most recent ruling (Decision No. 83-12-047 as modified by Decision No. 84-05-039), the Commission, although discussing the evolution of this right in prior decisions, clearly defined the ratepayer's interest as a traditional property right. "The very central point PG&E ignores here is that the extra space is *not* 'property held by [PG&E] in ownership. It is an artifact which the ratepayers have paid for and which is

extraneous to the provision of a bill.' " (app. p. 26). The Commission made no attempt whatever to distinguish billing envelopes or the "extra" space therein from any other property included in PG&E's rate base.

The Commission's ruling that the "extra" envelope space is "the property of PG&E's ratepayers" and that therefore PG&E's "taking" arguments have no merit (app. p. 27) is clearly erroneous. Although PG&E is a public utility, it is privately owned and consequently has a right to determine the use of its *own* property:

> [T]he property of a public utility, although devoted to the public service and impressed with a public interest, is still private property; and *neither the corpus of that property nor the use thereof* constitutionally can be taken for a compulsory price which falls below the measure. One is confiscation no less than the other.

United Railways and Electric Company of Baltimore v. West, 280 U.S. 234, 249 (1929) (emphasis supplied).

The ratepayers of PG&E are paying for the *service* rendered to them, not for the property used to render it. "By paying bills for the service, they do not acquire any interest, legal or equitable, in the property used for their convenience. . . . Property paid for out of monies received for a service belong to the company, just as does that purchased out of the proceeds of its bonds and stock." *Board of Public Utility Commissioners v. New York Telephone Co.,* 271 U.S. 23, 32 (1926). These principles were enunciated by this Court over fifty years ago and remain good law. In *Consolidated Edison Company v. Public Service Commission,* 447 U.S. 530 (1979), the central issue was whether a Commission ban on billing inserts by the company dealing with controversial issues of public policy violated the corporation's First Amendment right of free speech. In holding the ban unconstitutional, this Court assumed that the billing envelopes were Consolidated Edison's private property. The court stated that the utility "seeks merely

to utilize *its own billing envelopes* to promulgate its views on controversial issues of public policy." 447 U.S. at 541 (emphasis supplied).

As noted above, the fact that the ratepayers pay for the envelopes and postage used in PG&E's monthly bills is insufficient to give them property rights to the extra envelope space. Under this rationale, any unused or "underutilized" property of the utility such as land, vacant offices or conference rooms and unused storage space might be considered to be available for ratepayer use.

> Property rights are acquired through the creation, purchase or possession of a thing. Under the common meaning of the words, ratepayers are neither creators nor possessors of the utility's billing envelopes. *The Commission's decision is more simply understood as based on the premise that the utility has no rights to the extra envelope space.*

Comment, *Access to Public Utility Communications: Limits Under the Fifth and First Amendments,* 21 San Diego L. Rev. 391, 397 (1984) (emphasis supplied).

The Commission's ruling is a "taking" for it has taken the private property of PG&E and given it to a third party who would never have had any rights to it without this decision. This is a clear violation of the Fifth Amendment which prohibits the taking of private property for a public use without just compensation and which can be applied to state action through the Fourteenth Amendment. *Chicago, Burlington and Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 236 (1897).

Property rights include the right to use property, *United States v. Causby,* 388 U.S. 256 (1946); to sell property, *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922); and to exclude others from the property, *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Although the Commission action may be considered to be a "limited" taking, i.e. PG&E still retains space for its newsletter, this does not remove it from the sphere

of Fifth Amendment rights. In *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), this Court dealt with the issue of whether the involuntary installation of cable television facilities on appellant's roof constituted a "taking" of her property. Although acknowledging that the cables constituted an interference with only a portion of appellant's property, this Court ruled that it nevertheless constituted a taking compensable under the Fifth Amendment. "[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." 458 U.S. at 436-7.

Appellees may argue that the *Loretto* case does not apply because it involved an exclusive permanent taking whereas the instant case involves only a temporary limitation on the right to exclude, since TURN is given access to the billing envelopes only four times a year for two years. Under *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), and *Kaiser Aetna,* 444 U.S. 164, such temporary limitations are subject to a more complex balancing test to determine whether they are a taking. *Loretto,* 458 U.S. at 435 n.12. The 1984 Commission decision, however, did not restrict access to the billing envelopes to TURN only.

> Our action today should not be viewed as restricting access to TURN. The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, we will consider the feasibility and benefits of each at that time. *If we find that these proposals are meritorious, we could order that extra space be made available for the new program along with any previously authorized ones.*

(app. p. 19) (emphasis supplied). Thus, the Commission decision does have the effect of an exclusive and permanent taking of the extra envelope space. Just as TURN, a self-styled consumer group, received access to PG&E's billing envelopes, so may other consumer groups whose proposals the Commission may find meritorious. The practical problems of such a

system are obvious, but the constitutional problems are no less serious.[1] As this Court stated in the *Loretto* case:

> Property rights in a physical thing have been described as the rights 'to possess, use, and dispose of it.' *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First the owner has no right to possess the occupied space himself and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.

See Kaiser Aetna, 444 U.S. at 179-180; *see also,* Restatement of Property § 7 (1936), *cited in Loretto,* 458 U.S. at 435-6.

For the utility in the instant case, the PUC ruling does mean a loss of control over the use of their property, as well as a serious invasion of management rights.[2] It would be different if

[1] *See Vermont Public Interest Research Group, Inc., et al. v. Central Vermont Public Service Commission,* 39 PUR 4th 59 (1980), where the Vermont Public Service Commission denied the petition of seven public interest groups to have access to billing envelopes to reply to the utility's pronuclear power inserts. "Not only would a right of access policy in respect of the utility billing process inevitably curtail the very freedoms that petitioners assert would be enhanced, the administration of a right of access policy would be simply impractical. Parceling out the right to use the utility bill among every would-be-pamphleteer and politician would be, as a practical matter, impossible, subjecting the board to charges of favoritism and exposing it to endless litigation." 39 PUR 4th at 72.

[2] Regulatory power is limited to the area of direct consumer utility contact. The purpose of regulation is to ensure adequate service to the public. Therefore, a commission has extensive control over what services are to be provided for the public. On the other hand, *how* these services are to be provided is not so clearly within the grant of power. Invasion of management therefore "means that a regulatory body has attempted to order 'how' a service or facility is to be provided." Comment, *"Management Invaded"—A Real or False Defense?* 5 Stan. L. Rev. 110, 120-121 (1952).

the commission had ruled that PG&E should use this space for the benefit of the ratepayers, leaving it up to the utility how to implement such an order. In fact, this appeared to be what PUC contemplated in its 1981 ruling that the envelope space was "ratepayer property," (app. p. 72). At that time, PG&E could not anticipate that the PUC would parcel out this property to various third parties. What PUC has done in its 1984 ruling is appropriate the *control and allocation* of this property away from the utility and, as pointed out above, the loss of the right to exclude third parties from the use of one's property is a "taking."

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of California denying a Writ of Review of the decision of the Commission should be reversed and remanded for further proceedings consistent with the rights of PG&E under the Fifth and Fourteenth as well as the First Amendment rights of PG&E.

Respectfully submitted,

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